No. 21,523

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS, LOCAL UNION NO. 631, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,

Respondent.

Opening Brief for Intervenor and Charging Party, Reynolds Electrical & Engineering Co., Inc.

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Statement of the Case.

This is a Petition for Enforcement of an Order issued by Petitioner, National Labor Relations Board, against Respondent Labor Organization. The Board below adopted the decision of a Trial Examiner which found that Respondent had engaged in activity violative of Sec. 8(b)(4)(i)(ii)(D) of the Act, 29 U.S.C. Sec. 158(B) in that it had induced employees to engage in concerted refusal to perform services and a strike and had threatened and coerced the Charging Party for the object in both cases of forcing the Charging Party to assign particular work to employees represented by Respondent Union rather than to employees

represented by the International Brotherhood of Electrical Workers, Local 357 (Hereafter "Electricians").

Upon the initial filing of the Charge and Amended Charge the Board caused a Notice of Hearing under Section 10(k) of the Act, 29 U.S.C. Sec. 160(k) to be issued. Following such Hearing the Board made a determination of the work assignment dispute giving rise to the Charge. It found that this Intervenor had previously assigned the disputed work to Electricians and that Respondent and employees it represented had no jurisdiction or right to perform such work. Respondent failed to accept said determination whereupon in accordance with the usual procedure an unfair labor practice complaint was issued. On Hearing under that complaint the parties stipulated to the use of the record made in the Section 10(k) Hearing plus stipulations and additional exhibits entered in such unfair labor practice Hearing. Upon the failure of Respondent to comply with the Cease and Desist Order thereafter issued by the Board, the Board caused this Petition for Enforcement of Order to be filed.

Jurisdiction of Court.

This Intervenor, the Charging Party, is the general contractor for construction and support services for the Atomic Energy Commission at its Nevada Test Site. As such it is activity engaged in commerce within the meaning of the National Labor Relations Act (hereafter the "Act"). All parties concede the jurisdiction of the Board. The jurisdiction of the Court to enforce the Board's Order is predicated on Section 10 of the Act, 29 U.S.C., Section 160.

Statement of Facts.

The following is a partial statement of relevant facts.

At various times since 1951 the Atomic Energy Commission has conducted nuclear testing at the Nevada Test Site. This site consists of something in excess of 1,500 square miles and is sometimes referred to as "Mercury". Actually, Mercury is the townsite which is the entrance to the test site from Las Vegas and constitutes the on-site headquarters for the operations of this Company, as well as other agencies and contractors on the test site. The Charging Party, Intervenor Reynolds Electrical & Engineering Co., Inc., (hereinafter "REECO") has been the prime contractor for this AEC work on the Nevada Test Site since December, 1952 [Tr. 1882]. As prime contractor it has performed various types of construction, support and service work in connection with testing going on under the direction of the AEC.

From 1951 until October, 1958, testing at the site was essentially all atmospheric tests. On October 30, 1958, the President declared a unilateral moratorium of all further nuclear testing and this continued until September 6, 1961, at which time the President terminated it [Tr. 570, 441]. Since the end of the moratorium, September 6, 1961, all testing at the test site has been underground, either in tunnels or well holes.

As is shown on Examiner's Exhibit 5, the test site map, the site consists of various numbered areas which have been so established for administrative purposes. The AEC work is performed through various scientific laboratories and agencies and the work of one such agency will normally differ to some extent from the

work of another agency. Each such agency has a certain portion of the test site designated for experimental work under its supervision. For example, the Lawrence Radiation Laboratory's experimental work is principally performed in Areas 9, 2 and 10, while the testing supervised by Los Alamos Scientific Laboratory is principally performed in Areas 3, 1 and 7 [Tr. 345].

In the performance of its construction and support work in the forward areas for these agencies, REECO has employed construction craftsmen working under labor agreements with essentially all of the various construction trades. To facilitate its work in each testing area of the site there have always been and are now "compounds" or "staging areas" for most operating administrative areas. In this staging area or forward area compound, the area superintendent and each of the craft superintendents have trailers for their offices [Tr. 343-349].

In all of these various compounds in addition to the superintendent's trailer offices there are shop and construction facilities for each or most of the various building trades. These areas are sometimes fenced and sometimes unfenced and are generally referred to as the compound for each particular craft [Tr. 349-351, 353; 848-850]. Also, the entire staging area is generally referred to as a compound, including therein the respective compounds and shops of most crafts [Tr. 343].

Surrounding the compound for each administrative area such as areas 9 and 3 are a number of points at which materials fabricated by the crafts in their construction compound are put to actual testing use. In the case of these areas these points consist of well holes at which a test will be conducted [Tr. 871, 357].

For example, in Area 3 there are about twenty-five such holes at which operations presently exist [Tr. 356]. For each well hole REECO builds several structures to be used in connection with the test. These structures are initially built in the compound by the various craftsmen and then transported to the well hole involved for installation [Tr. 408-409, 414, 869].

For the construction and support services in each of the administrative areas REECO has materials delivered to the various forward compounds upon requisition by construction personnel [Tr. 359-360]. Most of these materials are taken from one of the five warehouses operated on the test site by REECO. These five warehouses, recognized as such, are covered by the Teamsters' contract, Teamster Exhibit 5, and completely staffed and operated by teamster-represented personnel [Tr. 901-908; 935-936]. No dispute exists as to any of such five recognized warehouse locations.

Materials taken from the teamster-operated warehouses are delivered on REECO trucks driven by teamster drivers and are unloaded at the compound of each particular craft involved. The unloading at the compound has never been by teamsters. It has always been unloaded by hand by the craft involved, sometimes by or with the assistance of laborers, and if by forklift by operating engineers [Tr. 360-363; 865]. Essentially all of the materials so delivered to the craft compounds are to some extent there fabricated and constructed and this is the reason they are so delivered [Tr. 360-362; 408]. It has been found more efficient and economical to have these materials fabricated and constructed in the compound, where more or less permanent shop locations and supporting facilities are avail-

able, than at the various holes [Tr. 515, 409]. As materials are fabricated and are made ready for installation at the well hole location, they are loaded into trucks in the compounds by the particular craft who fabricated them, sometimes with the assistance of or by laborers, and these will be loaded by operating engineers if forklift is required [Tr. 865, 420]. The great preponderance of testimony demonstrates that throughout the history of the test site the operation of trucks hauling electrical materials and/or crews in the forward areas, and particularly between compound and points of use as well as from one point of use to another within the same administrative area, has been by electricians to the exclusion of teamsters [Tr. 342, 420, 436-437, 562, 585, 836, 888, 833-834, 839-840, 2431-2432, 2412; 2490-2491, 2492-2493, 2494, 2497, 2499; 2532-2533, 2534, 2537, 2538, 2540, 2541, 1135-1137, 1140, 1141].

No teamster warehouse personnel (as distinct from drivers) are now or ever have been employed in any of the forward area compounds or staging areas [Tr. 874, 446].

In short, the dispute giving rise to this proceeding, was a demand by the teamsters that all of these various forward compounds constitute "warehouses" within the meaning of their (teamsters') contract because materials were there set off to be used either then or at some time in the future, and that this constitutes the "warehousing" of materials. If this were conceded (the teamsters argued), then the unloading, counting, sign-

ing delivery tickets, storing, placing and loading out would become the work of the teamsters to the exclusion of the other crafts who had performed it.

In addition to this jurisdictional claim there was a further contention against electricians consisting of the operation of vehicles transporting materials from the various electrical compounds to one or more of the points of use which that cmmpound services, that is, the surrounding well holes.

To enforce their claims the teamsters engaged in a variety of concerted actions ranging from threats and refusing to deliver materials from an acknowledged teamster operated warehouse to craft compounds, to a general strike and picketing. This conduct is set forth in the Trial Examiner's Decision [R. 23, line 40, R. 28, line 30]. It need not be further considered since the Respondent Union did not except to these findings of fact to the Board below, nor are they challenged here. The fact that the Respondent engaged in concerted activity and threats thereof to support their work claims is not an issue before this Court.

REECO initiated proceedings below by filing the Charge and amended Charge [R. 3-6] alleging the Respondent to be in violation of Section 8(b)(4)(i)(ii)-(D) of the Act. (29 U.S.C. 158(b)). There followed a hearing under section 10(k) of the Act (29 U.S.C. 168(k)) and the Board's determination that the disputed work had been properly assigned by REECO to

the electricians, and that the Respondent or employees it represented had no right to perform such work.

The Respondent refused to accept such determination. The General Counsel of the Board issued an unfair labor practice complaint [R. 7 *et seq.*] to which Respondent answered [R. 12 *et seq.*].

There followed hearing and decision by a Trial Examiner [R. 17 *et seq.*] which decision the Board adopted *in toto* [R. 57 *et seq.*].

Questions Presented.

In its answer to the complaint [R. 12] as well as its answer to the Petition before this Court [R. 61 *et seq.*] Respondents raise no question of adequacy of evidence to support findings; they present only the questions:

(1) Was the Board authorized to process and resolve the dispute where Respondents' claim is based on alleged contractual commitments conceding to it the disputed work tasks; or, was the Board required to stay its action pending litigation of such contractual assertions in the District Court?

(2) Is the Board precluded from prosecuting unfair labor practices occurring after the filing of the charge?

(3) Was the Board justified, in issuing a "Broad Form" Cease and Desist Order?

ARGUMENT.

The authority of the Board under Section 10(k) of the Act to determine the propriety of work assignments which are the subject of a jurisdictional dispute between two or more labor organizations cannot be questioned. The fact that contractual claims may be to some degree a basis for the claim of one or more unions is a typical circumstance. The Board is constitutionally empowered by the Act in the resolution of such jurisdictional disputes to deal with such contractual claims. Respondent's argument that the presence of contract claims precludes the Board's exercise of its jurisdiction is without merit and of course assumes the very question involved here.

The Charge and Amended Charge filed by this Intervenor set in motion the Board's jurisdiction. The Board was therefore empowered to allege in its complaint any conduct constituting an unfair labor practice and within the general description of the Charge even though such conduct may have occurred or continued subsequent to the filing of the Charge.

In the context and circumstances of this case in which Respondent engaged in massive, extreme and irresponsible concerted conduct the Board's decision to issue a "Broad Form" Order is justified.

I.

The Board's Jurisdiction to Prevent Unfair Labor Practices Is Not Preempted by Alleged Contract Claims or the Pendency of Judicial Proceedings Involving Such Claims.

At the time of the dispute in question, REECO was party to written collective bargaining agreements with the Electricians' Union [I BEW Ex. 4] and Respondent, [Teamsters Ex. 5]. Both unions at the time of the dispute claimed the work, in part based upon the terms of their respective contracts with REECO In addition a part of the Teamsters' claim was the so-called Carter-Leigon Agreement of February 29, 1952 between the Electrician's Union and Respondent Teamsters. This agreement provided as follows:

> "The mutual understanding as to the interpretation of the existing agreement, copy of which is attached, between the two International Unions was determined as follows:
>
> "*Paragraph #2:* Crew or Line truck referred to in this paragraph shall be loaded by Warehousemen if available, or composite crew, at the start of the shift, and operated by I.B.E.W. men. All other materials required during the shift other than first loaded as above, shall be requested from the warehouse or yard and delivered by vehicle operated by Teamsters.
>
> "It was further mutually agreed that a composite crew of Warehousemen and Electricians shall work together in the warehouse storing electrical material exclusively. One to one ratio between the two crafts shall be maintained as equally as possible." [Teamsters' Ex. 6A].

The agreement referred to in the first paragraph of the Carter-Leigon Agreement was dated February 11, 1942 and was executed by the International Unions [Electricians and Teamsters] and provided:

> "It is hereby agreed that the operators of vehicles delivering electrical material come under the jurisdiction of the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS.
>
> "It is further agreed that the operators of vehicles used for electrical construction work, maintenance work, or electrical repair work—that is, when such vehicles are used for transporting man or men and/or material to and from job, and said vehicle remains at job site with man or men in the performance of electrical work, and the operation of the vehicle is an integral part of the work—such operator comes under the jurisdiction of the INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS.
>
> "It is understood and agreed that the equipment operated by electrical workers shall only be the truck carrying the line and maintenance crews, tools, etc., to and from the job, or the emergency car from electrical contracting shops carrying only tools and repair equipment for emergency work. Operation of all delivery equipment for the delivery of materials of all character, such as poles, pipes, transformers, cables, and electrical appliances, such as refrigerators, radios, etc., shall be the jurisdiction of the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS." [Teamsters' Ex. 6B].

As will be noted both Agreements were between the two unions only and neither contained any arbitration procedure for determining their application. The Board in making its determination following the Section 10(k) Hearing concluded that these agreements did not give any right to the work assignments to the Teamsters Union. That determination was based on the long history of practice at the Nevada Test Site where the Carter-Leigon Agreement has never been applied to compounds in the manner contended for by Respondent. The decision was also based on testimony of a number of witnesses who were present at the time the Agreement was negotiated and executed in 1952. The evidence was to the effect that the subject matter of the Carter-Leigon Agreement was a particular warehouse storing electrical supplies exclusively located in Mercury, Nevada and had no application at all to forward areas compounds. We do not understand Respondents to take exception to the Board's determination in this regard; we understand only that they object to the Board exercising jurisdiction to make such determination.

Also the Teamsters rely as to certain aspects of the disputed work assignments on a Joint Board award which it contends awarded the disputed work to them [Teamsters' Ex. 13]. This award was rendered under the procedure set out in the agreement of the Respondent with REECO [Teamsters' Ex. 5]. It was later clarified by the Joint Board upon request of REECO [Teamsters' Exs. 14 and 15]. The body making that award was a bi-partite committee consisting one-half of Respondent itself and the other half employer contractors having agreements with the Teamsters' Union. The

Electricians' Union and electrician employers were neither covered by the agreement nor party to the procedure resulting in the award. REECO contends that the award is invalid since the agreement under which it was given expressly states [Teamsters' Ex. 5] Section II, subparagraph D that the Joint Board may not resolve any jurisdictional disputes [See Footnote 23 of Trial Examiner's Decision, R. 35].

The Electricians' Union proceeded under their agreement with REECO and presented their work assignment claim to the Joint Conference Committee procedure set forth in that agreement. They likewise received an award setting forth their right to the work [IBEW Exs. 2A and 2B].

Shortly *after* the Charge was filed giving rise to this case [May 5, 1964, R. 3] the Teamsters filed an action in the Nevada Federal District Court seeking to enforce such award and to litigate its asserted contractual claims. The pleadings in that case were placed into evidence in a Hearing before the Trial Examiner as General Counsel's Exhibits 6A through 6F inclusive. General Counsel's Exhibit 6F is an Order of the District Court staying that proceeding pending final resolution of this unfair labor practice case before the Board and the Court. The Court's authority to stay its jurisdiction in recognition of the primary jurisdiction of the Board was recently upheld by this Court in a case directly in point and also involving REECO and the Nevada Test Site (*United Association, etc., v. Hon. Roger D. Foley Jr., Judge of the U.S. District Court, District of Nevada,* CA-9, No. 21562).

In this context we reach Respondent's first affirmative defense to this Petition for Enforcement, its con-

tention that since its claims are based upon contract (we assume the Carter-Leigon Agreement and its collective bargaining agreement) the Board is without jurisdiction to resolve the dispute and the Federal District Court is the only tribunal who may declare contract rights.

We submit that Respondent's contention is totally lacking in merit. In the first place Section 10(k) of the Act not only authorizes the Board to resolve a jurisdictional dispute, it requires it to do so. This was the decision of the Supreme Court in *N.L.R.B. v. Radio and Broadcast Engineers* (1961), 364 U.S. 573. In that case both of the disputing unions, as here, had a collective bargaining agreement with the employer. While the terms of the agreements did not largely enter into resolutions of dispute, it is at least of some value that the Supreme Court's holding that Section 10(k) of the Act both authorized and required the Board to determine the merits of a jurisdictional dispute occurred in a context in which the disputing unions had written agreements with the employer.

Even more directly in point is the decision of the Supreme Court in *Carey v. Westinghouse Electric Corp.* (1964), 375 U.S. 261. In that case the union sought to compel arbitration of its claim to be the exclusive representative of employees performing certain work assignments to the exclusion of another labor organization whose employees were performing the work. Nothing had occurred (that is concerted activity) to warrant the Board exercising its unfair labor practice jurisdiction and no proceeding was pending before the Board. In this context the Supreme Court held that there was no reason why arbitration between the em-

ployer and one of the unions should not go forward. In its decision the Supreme Court strongly emphasized the fact that no Board proceeding was pending or foreseen. At the same time the Court recognized that if the Board did take jurisdiction that it would have superior authority over any arbitration award rendered under the agreement. Thus the Supreme Court stated:

> "Should the Board disagree with the arbiter, by ruling, for example, that the employees involved in the controversy are members of one bargaining unit or another, *the Board's ruling would, of course, take precedence;* and if the employer's action had been in accord with that ruling, it would not be liable for damages under § 301.
>
> * * * * *
>
> *"The superior authority of the Board may be invoked at anytime.* Meanwhile the therapy of arbitration is brought to bear in a complicated and troubled area" (Emphasis added). *Carey v. Westinghouse Electric Corp.,* 375 U.S. 261, 272.

In *Carey v. General Electric Company (*2nd Cir. 1963), 315 F. 2d 499, the facts were essentially the same, that is, no Labor Board proceeding existed or was anticipated, and the court directed arbitration. The fact that the court would not have done so if a Board proceeding was in existence, (or a conflict existed, as here) however, is clearly demonstrated by its following statement:

> "12. * * * We note, in passing, that even though the possibility of some future presentation of the representation issue to the NLRB should not forestall the courts from directing arbitration, *it is not at all inconsistent for a court to*

> *defer its judgment should the Board already be seized of jurisdiction* over a complaint by one of the parties to the contract. See Note 59 Colum. L. Rev. at 170." (Emphasis added). *Carey v. General Electric Company,* 315 F. 2d 499, Footnote 12, 511.

In *Local 33, Int. Hod Carriers, etc. v. Mason Tenders, Etc.* (2nd Cir. 1961), 291 F. 2d 496, the court also ordered arbitration of what was essentially a jurisdictional dispute between two labor unions. The court was careful to note that it was doing so in a context in which there was no proceeding pending before the National Labor Relations Board and nothing had occurred to justify anticipating such a proceeding, noting, however:

> "Perhaps it is fair to conclude that where the contract sued upon impinges upon some clearly established activities of the NLRB a District Court must step aside or at least stay its hand * * *"
> *Local 33, Int. Hod Carriers Etc. v. Mason Tenders, Etc.,* 291 F. 2d 496, 503.

In *N.L.R.B. v. Local 825, Internat'l Un. of Operating Engineers* (3rd Cir. 1964), 326 F. 2d 213, the respondent union in part defended its claim to disputed work in a jurisdictional dispute with another union on the grounds that it had an arbitration award for such work. The Court held that this award was not binding on the other union and therefore was not binding upon the Board. As that decision reflects on its face, the Board in making the work assignment determination interpreted and applied the collective bargaining agreements of both unions and the Court affirmed and enforced the Board's Order.

The authorities, we submit, establish the principle in directly comparable circumstances that the Board has authority and jurisdiction to determine work assignment disputes notwithstanding the fact that one party's claim is based upon a contractual assertion. Other cases recognizing the Board's jurisdiction as primary to the Court's in similar context are:

Kentile Inc. v. Local Union 457, United Rubber, C., L. & P. Wkrs. (E.D.N.Y. 1964), 288 F. Supp. 541;

McLeod v. American Fed. of Television & Radio Artists, N.Y. Loc. (S.D. N.Y. 1964), 234 F. Supp. 832;

International Union, Etc. v. Metal Polishers, Etc., Union (S.D. Cal. 1960), 180 F. Supp. 280.

Respondent's contention is based perhaps in part upon authorities which are not applicable in these circumstances and which have been largely, if not totally, overruled by the Supreme Court. We refer to the decisions of this Court in *Square D Company v. N.L.R.B.* (9th Cir. 1964), 332 F. 2d 360 and *N.L.R.B. v. C & C Plywood Corporation* (9th Cir. 1965), 351 F. 2d 224. In both of those decisions this Court held that the question of whether or not the employer had refused to bargain as required by the Act was only indirectly involved. The Court reasoned that the essential characteristic of the dispute was the interpretation of a contract and only secondarily was the question of unfair labor practice involved. The Court held that in such a context the Board should leave the matter to contractual litigation either judicially or by arbitration. In the instant case the essential characteristic of the dispute is

a jurisdictional dispute prohibited by the Act. It is a quarrel involving concerted activity between two unions over which group of employees shall have exclusive right to perform certain work. While both may predicate their claims upon contract as well as practice, this does not change the character of the prohibited activity. Indeed jurisdictional disputes are typically disputes in which one or more of the unions alleges a contractual basis for its claim. The two collective bargaining agreements are agreements only between the Respondent union and REECO and the Electricians and REECO and not between the Respondent union and Electricians. Therefore, any award under either agreement is not binding on the other union. The only means of resolving such a tri-partite dispute is through the Board's proceedings since the parties have not seen fit to execute a tri-partite document providing a conclusive means of determining which union is entitled to the exclusive work assignment. We submit therefore that the rationale of either the *Square D* case or the *C & C Plywood* case is not applicable to an unfair labor practice involving a jurisdictional dispute.

The Supreme Court granted certiorari in the *C & C Plywood* case and reversed it. *N.L.R.B. v. C & C Plywood Corp.* (1967), 385 U.S. 421, 17 L. Ed. 2d 486. The Supreme Court held that the Labor Board was given authority by Congress to interpret and apply contracts where it was essential to its determination of unfair labor practices. It stated:

> "The legislative history of the Labor Act, the precedent interpreting it, and the interest of its efficient administration thus all lead to the conclusion that the Board had jurisdiction to deal with

> the unfair labor practice charge in this case. We hold that the Court of Appeals was in error in deciding to the contrary."
>
> *N.L.R.B. v. C & C Plywood Corp.* 385 U.S. 421, ..., 17 L. Ed. 2d 486, 493.

In *C & C Plywood* the contract did not include the usual arbitration provision found in union agreements. However, this was not the predicate of the Supreme Court's decision. This is illustrated by the fact that on the same day that the Supreme Court decided the *C & C Plywood* case it also decided *N.L.R.B. v. Acme Industrial Co.* (1967), 385 U.S. 432, 17 L. Ed. 2d 495. Essentially the same question was presented to the Supreme Court in this case and the contract in question did include an arbitration provision. The Supreme Court reversed the Court of Appeals holding refusing to enforce the Board's Order on the same ground as *C & C Plywood* and the *Square D* case. The presence of an arbitration clause in the agreement did not lead the Court in the *Acme Industrial* case to any different conclusion than it reached the same day in the *C & C Plywood* decision and on the same point.

In *N.L.R.B. v. Huttig Sash & Door Co., Inc.* (8th Cir 1967), ... F. 2d ...., 65 L.R.R.M. 2431, the Court sidered the question of whether the *C & C Plywood* decision of the Supreme Court applied only where the agreement did not contain an arbitration clause or whether it affirmed the Board's jurisdiction to interpret and apply contracts without regard to the presence or absence of an arbitration clause. That Court concluded:

> "It is also possible, perhaps, for one to say that in C & C Plywood the Court emphasized the absence of an arbitration provision and seemingly

> used this in partial justification of the conclusion it reached, whereas in Acme it contrarily expressed concern about overburdening that same arbitral process. If there is any trace of logical inconsistency here, it is lost and rendered meaningless, we think, in what we regard as the other overriding and vital features of the two decisions, namely, that, of itself, neither the presence of a problem of contract interpretation nor the presence of an arbitration provision in the contract deprives the Board of jurisdiction."
>
> *N.L.R.B. v. Huttig Sash & Door Co.*, ... F. 2d ...., 65 L.R.R.M. 2435.

Finally, the question we have been considering was brought to this Court's attention in *N.L.R.B. v. Honolulu Star-Bulletin, Inc.* (9th Cir. 1967), 372 F. 2d 691. The Court had withheld decision in this case pending determination of the *C & C Plywood* case by the Supreme Court. Here, again, the issue before the Court was whether the refusal to bargain determination was within the Board's authority since its determination required consideration of contractual matters. The decision, rendered after the Supreme Court's *C & C Plywood* decision, recognized the authority of the Board to determine contract matters stating that the Supreme Court's decision "* * * unquestionably determined the issue of the Board's jurisdiction in this case" 372 F. 2d at 693.

In the *Honolulu Star Bulletin* case the Court did not consider whether or not the agreement in question contained an arbitration clause. The record before the Court has been inspected and it also does not disclose whether the agreement contained an arbitration clause.

The presence or absence of such a clause was obviously treated by the Court as being irrelevant to its recognition that the Board has jurisdiction in the exercise of its unfair labor practice prosecuting authority to interpret and apply contract provisions.

It is submitted therefore that there is much authority in judicial recognition of the Board's jurisdiction to interpret and apply contracts in the exercise of its otherwise clearly established authority. The Act itself recognizes this in Section 10(a), (29 U.S.C. Section 160(a)) where the authority of the Board to prosecute unfair labor practices is established. The Act there states "this power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise."

II.

The Complaint Properly Alleged and Prosecuted Conduct Arising After the Filing of the Amended Charge.

Respondent contends that the original Charge filed May 5, 1964, and the Amended Charge filed May 11, 1964, complained only of Respondent's economic action taken in connection with the "composite-staffing" of the forward compounds and did not relate to the dispute as to the "hauling" of material from the forward compounds to the point of use. While Respondent admits that the "hauling" dispute existed prior to the filing of the charges by REECO, Respondent argues that no economic action was taken in connection with this dispute during the periods covered by said charges [R. 68].

Initially it should be noted that the Amended Charge filed by REECO on May 11, 1964, specifically asserted

that the activity engaged in by Respondent at the Nevada Test Site had as one of its objectives to force and require REECO to assign the work of "transporting . . . materials from the point of . . . unloading . . . to the point of installation or utilization" [R. 6] to teamsters.

The Trial Examiner specifically concluded that the "hauling" issue had been raised by the Amended Charge [R. 33].

Even if the Charge and Amended Charge had not specifically alleged the existence of actions by Respondent relating to "hauling" issue, these activities could be and were properly considered as matters within the jurisdiction of the Board under Section 10(k). The Trial Examiner quite properly concluded that the filing of a charge does not crystalize the Board's jurisdiction to actions taken prior to the filing of that charge but on the contrary is merely an initiating procedure which sets in motion the investigatory machinery of the Board as to all conduct both prior and subsequent to the filing of the charge relating to the general type of unfair labor practice which has been alleged [R. 33]. When this very issue was presented to the United States Supreme Court in *N.L.R.B. v. Fant Milling Co.* (1958), 360 U.S. 301, the court held:

> "A charge filed with the Labor Board is not to be measured by the standards applicable to a pleading in a private lawsuit. Its purpose is merely to set in motion the machinery of an inquiry. *Labor Board v. I. & M. Electric Co.,* 318 U.S. 9, 18. The responsibility of making that inquiry, and of framing the issues in the case is one that Congress has imposed upon the Board, not

the charging party. To confine the Board in its inquiry and in framing the complaint to the specific matters alleged in the charge would reduce the statutory machinery to a vehicle for the vindication of private rights. This would be alien to the basic purpose of the Act. The Board was created not to adjudicate private controversies but to advance the public interest in eliminating obstructions to interstate commerce, as this Court has recognized from the beginning. *Labor Board v. Jones & Laughlin,* 301 U.S. 1.

"Once its jurisdiction is invoked the Board must be left free to make full inquiry under its broad investigatory power in order properly to discharge the duty of protecting public rights which Congress has imposed upon it. There can be no justification for confining such an inquiry to the precise particularizations of a charge. For these reasons we adhere to the views expressed in *National Licorice Co. v. Labor Board.*"

N.L.R.B. v. Fant Milling Co., 360 U.S. 301, 307-309.

In reaching this conclusion the Supreme Court upheld a previous Supreme Court decision in *National Licorice Co. v. N.L.R.B.* (1940), 309 U.S. 350, 369. The aprpoach of the Trial Examiner in the instant case has been consistently followed by the Board.

See *E.g.:*

Texas Industries, Inc. (1962), 139 N.L.R.B. 365, 366-367;

Lodge 68 of the Int'l Ass'n of Machinists (1949), 81 N.L.R.B. 1108, 1113 at n. 3.

To the extent that there is any limitation upon the Board in prosecuting unfair labor practices arising after the filing of the charge, this limitation relates only to conduct which would violate provisions of the Act unrelated to the provisions upon which the charge was based. Thus, the Supreme Court in the *National Licorice Co., supra,* decision stated:

> "Whatever restrictions the requirements of a charge may be thought to place upon subsequent proceedings by the Board, we can find no warrant in the language or purposes of the Act for saying that it precludes the Board from dealing adequately with unfair labor practices which are related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board. * * *"
>
> *National Licorice Co. v. N.L.R.B.,* 309 U.S. 350, 84 L. Ed. 799, 813.

Accord:

> *N.L.R.B. v. Fant Milling Co., supra,* 360 U.S. 301, 309.

Again, in *N.L.R.B. v. Lasko Metal Products, Inc.* (6th Cir. 1966), 363 F. 2d 529, the court in finding jurisdiction in a case similar to the one before this Court stated:

> "This language in the Union charge was certainly adequate to fulfill the statutory requirement and to initiate NLRB action. Once a charge has been made, the NLRB investigation and complaint are not confined to the specific details of the charge but may extend to related matters of the same class of violations charged. [Citations omitted]"
>
> *N.L.R.B. v. Lasko Metal Products, Inc.,* 363 F. 2d 529, 530.

The Respondents contend that their economic actions relating to "hauling" commenced on May 11, 1964, after the filing of both the Charge and Amended Charge, and that this activity did not permit the Board to find a violation of Section 8(b)(4)(D) as to both the "composite-staffing" and the "hauling" disputes since they involved "different and unrelated claims" [R. 69]. This argument ignores the fact that the "hauling" dispute was in fact in existence at the time Respondent filed the Charge and Amended Charge [R. 68], that the Amended Charge specifically referred to the "hauling" dispute and that both the "composite-staffing" and the "hauling" unfair labor practice violations involved activities in violation of Section 8(b)(4)(D), constituted part of a comprehensive jurisdictional dispute and took place as a part of a continuous series of activities. Thus, it is quite clear that the Board did not exceed its jurisdiction in connection with the "hauling" dispute.

III.

The Board Properly Ordered the Issuance of a "Broad Form" Cease and Desist Order

Respondent urges that all economic action taken by Respondent related to work being assigned by REECO to the Electricians and that Respondent did not engage in a jurisdictional dispute with any craft other than the Electricians [R. 69-70]. Based upon this contention, Respondent argues that the Cease and Desist Order and Notice pursuant thereto should be modified to cover only the work in dispute between the Respondent and the Electricians [R. 70-71].

The premise upon which Respondent bases its argument arises from a complete misconception of the find-

ings of the Board and the Trial Examiner. The Board in making its jurisdictional determination held that the proscribed activity was engaged in only to compel a change of work assignments from the Electricians to Respondent [R. 9-10]. The Trial Examiner found that while that was the purpose of the proscribed activity, it was intentionally directed, by means of job interference, not only to supplies and materials destined to electricians, but to all of the various trades [R. 20]. Respondent states this holding as being one paramount to a holding that proscribed activity directed to non-electricial trades constituted a jurisdictional strike as to such non-electrical trades. This is not at all the effect of the Examiner's finding. He merely found that the Respondent interfered with the work of all trades to support its jurisdictional claims against the Electricians.

The holding of the Trial Examiner is more than abundantly supported by the record. Respondent instituted and continued a course of conduct designed to interfere with all of the various trades in the forward area.

At noon on May 11, 1964, Teamster Business Agent Batista openly instructed the warehousemen that they were to sit down and do no work after they returned from their luncheon break at 12:30 [Tr. 290-291, 1666]. The warehousemen complied and engaged in what amounted to a sit-down strike at the Mercury warehouse. During that time, they refused to do *any work,* including any issue of material to *any craft.* While their interferences in the morning allegedly related only to electrical supplies, in the afternoon this was converted into a wholesale refusal to issue or deliver materials to any compound or to any craft [Tr.

290-291]. All of this was admitted by Teamster Steward Gile [Tr. 1666-1667]. At approximately 2:30 in the afternoon, the Company advised the Union officials that the employees were not being paid while on the sit-down strike, whereupon they all walked off the job.

On May 12, 1964, the Teamsters declared a general Teamsters strike and placed a picket line at the entrances to the test site, and this strike was participated in by all members of the Teamsters Union employed by the Company. It lasted until enjoined [Tr. 2110-2111, 294, 292] by the Federal District Court upon the petition of the Regional Director.

Mr. William Carter, the Teamsters highest executive officer [Tr. 86], admitted that on or about April 17, 1964, he ordered his business agents to go to the Test Site and instruct all stewards and warehousemen not to permit the loading and delivery of any materials to the forward compounds [Tr. 307, 308, 309, 310, 314, 383]. The result was that these business agents on the next day complied with Mr. Carter's demands [Tr. 2078-2079, 2071] and as will hereafter appear, deliveries to *all* compounds for *all* crafts in the forward areas were completely disrupted. Mr. Carter subsequently contradicted his earlier testimony and stated that his business agents had misunderstood him and that his instructions had been to stop deliveries of material to the electrical compounds only [Tr. 2079].

What actually happened after Mr. Carter gave his instructions to the business agents on or about April 17, 1964, is the following: Richard A. Campbell, an area superintendent operating from a compound located in Area 12 which employed all of the various crafts, such as electricians, laborers, plumbers, sheetmetal workers,

operating engineers, carpenters, painters and ironworkers [Examiner's Ex. 4, 124-125 of General Counsel Ex. 3] was called upon by Mr. Batista, a Teamster Business Agent, with two stewards and advised that "We would not be able to receive any material unless we had a Teamster clerk to check it off at the time it was delivered and tally it in." That function was then being performed by the crafts mentioned. Thereafter, the shuttle truck from the Mercury warehouses would drive up to the yard "but he wouldn't stop, he would just drive right on through . . ." [Examiner's Ex. 4, 129-130 of General Counsel Ex. 3].

William E. Boggs, the Warehouse Superintendent in the warehouse in Area 12, was advised by his driver Steward Gwinn that "* * * they would not deliver material to any compound where there was not a Teamster clerk to receive it, or a Teamster forklift operator to unload it." This statement referred to compounds in the various areas, and the threats and subsequent execution of them (as in the case of Campbell) included but was not limited to electrical compounds. Thereafter, the Teamsters loaded trucks for the various compounds but loads were received back at the warehouse yard without having been delivered, all as threatened by the steward. This condition continued for some two or three days [Examiner's Ex. 4, 139-141 of General Counsel Ex. 3]. Significantly, each truckload of supplies which the driver refused to deliver out of the Area 12 warehouse during this time were supplies destined for a single craft [Examiner's Ex. 4, 141-142 of General Counsel Ex. 3]. Quite commonly a truckload consists of supplies for various crafts but this was not so in these cases. Since each load was for a single

craft, this means there were refusals to deliver loads which had no electrical supplies aboard as they consisted of all general types of construction supplies including lumber and obviously non-electrical materials [Examiner's Ex. 4, 140 of General Counsel Ex. 3].

Sylvester Hooks, a laborer Foreman employed in Area 9 compound, described the following interferences: On April 27, 1964, he requested a truck from the Teamsters' pool located in the vicinity of Area 9 compound for the delivery of fence posts to be used by the laborers in the performance of their work. The Teamster Foreman (a classification covered by the Teamsters' contract) to whom Hooks made his request refused to assign a truck and the Teamster steward who was present "said that they wouldn't be hauling anything to or from the compound until they got teamster warehousemen and a forklift operator . . . teamster forklift operator . . ." [Examiner's Ex. 4, 142-148 of General Counsel Ex. 3]. The Teamster steward who made the statement was Hymas, who later testified (shown on the record as "Hyman") but carefully avoided any reference to the above-described event.

The frivolity with which the Teamsters engaged in the complete frustration of the attempts by crafts to obtain supplies in the forward compounds was best described by Mr. Lavendar, acting Superintendent of general stores in the main Mercury warehouse. On Monday, April 27, and Tuesday, April 28, he took precautions in giving instructions to Teamster delivery drivers concerning the delivery, because during the preceding week drivers had returned loads to the warehouse which had been dispatched for delivery to compounds [Tr. 270-271]. Commencing Monday morning, April

27, Mr. Lavendar called the Teamster foreman, Teamster steward and each driver into his office and instructed the driver that he was to take his assigned load to particular area superintendents, to see that it was delivered as instructed by the superintendent, and that he was not to return to Mercury with his load; that if he did, he would be subject to disciplinary action. These instructions were the same for all drivers, all were made in the presence of the Teamster steward and all drivers departed with their loads after receiving such instructions. This was some ten or eleven drivers on April 27 and 28 [Tr. 276-277]. Notwithstanding these instructions, none of the drivers just mentioned delivered their loads, but instead returned them to the warehouse. As each driver returned, Mr. Lavendar went through the same procedure. He called the Teamster steward and the driver into his office and asked why the driver had not delivered his loads to the particular area as instructed. All of them told him essentially the same thing, which was that Mr. Batista, the Teamster Business Agent, had instructed them if there were no Teamster personnel to offload the trucks, that they were not to permit them to be unloaded, but instead were to return them loaded to the warehouse. All drivers said this in the presence of the Teamster Steward, Mr. Gile, who made no disagreement [Tr. 301, 278-279].

Each delivery driver when being assigned to deliver a load of materials is given a delivery ticket for the supplies which he is to deliver to each craft, so that he may obtain a signature from each craft when the delivery is made [Tr. 270]. As each of the drivers returned on April 27 and 28, Mr. Lavendar took posses-

sion of the various delivery tickets covering each load [Tr. 279]. These were produced at the hearing, and the witness went through all delivery tickets for all the loads which were not delivered pursuant to the Business Agent's instructions on April 27 and 28, and they clearly prove that the Teamsters were at that time refusing to deliver materials to *all* construction crafts. Thus the materials which the drivers did not deliver on April 27 and 28 included those for electricians, plumbers, carpenters, office supplies, drillers (operating engineers), sheetmetal workers, ironworkers [Tr. 281-288]. In some instances these same drivers had materials on their trucks which were destined for one of the recognized warehouses in addition to materials for a compound. Significantly, while those drivers refused to deliver the material on their trucks to compounds, they did make delivery of the materials destined for a recognized Teamster warehouse [Tr. 282-283]. This clearly proves that the Teamsters were consciously refusing to deliver to all of the various trades, since there was no physical inhibition against delivering non-electrical materials to any particular craft compound any more than there was to a recognized warehouse. In other words, the Respondent sought to enforce its demands for work assignments of electricians not only by refusing to deliver to that craft, but by a general refusal to deliver to any and all crafts in the same compound.

The Teamster steward present when Mr. Lavendar gave his instructions to the various drivers and when those drivers explained that they had refused to deliver because of Batista's instructions was Mr. Gile [Tr. 279]. Mr. Gile testified in this proceeding, but the Teamsters asked him no questions concerning the events

described by Lavendar, and there is nothing in his testimony or in his conduct which in any way implies that the drivers were not speaking truthfully when they stated that Batista, the Business Agent, had instructed them to make no deliveries to any compound unless Teamster personnel offloaded their trucks. Those statements, being made in the presence of this steward, who made no disagreement with them, and the failure of the Teamsters to inquire of him, Mr. Batista or the drivers in this hearing concerning them certainly constitute an admission by the Teamsters that the drivers spoke truthfully concerning Batista's instructions. There were many other instances of refusal to deliver to various crafts [Tr. 404-406, 589-592, 866-867].

The above-described incidents demonstrate quite clearly that during the period considered in this proceeding, Respondent used every means possible and acted upon every person available to it in preventing the delivery of materials to *all* the forward compounds and *all* the various crafts at the Nevada Test Site and not solely the Electricians. Nowhere in its Answer To Petition For Enforcement [R. 61-71] does Respondent deny that it interfered with the delivery of materials to various craft unions other than the Electricians. Rather, Respondent simply argues that it was not engaged in a jurisdictional dispute with these other crafts. It is, of course, unnecessary to find the existence of a jurisdictional dispute with these other crafts to support the broad form ease and Desist Order and Notice at issue in this case. It need only be shown that Respondent demonstrated a predisposition to coerce REECO through the various crafts at the Nevada Test Site with the object of forcing REECO to assign par-

ticular work to Respondent. Once it is demonstrated that Respondent in attempting to accomplish its goals as to the Electricians also refused to deliver materials to the other crafts at the Nevada Test Site, the broad form Cease and Desist Order and Notice are within the jurisdiction of the Board to issue.

The propriety of the issuance of a broad form Cease and Desist Order has been raised most frequently in the area of employer unfair labor practices. Thus, the Supreme Court of the United States in *N.L.R.B. v. Express Pub. Co.* (1940), 312 U.S. 426, 85 L. Ed. 930, while not finding the basis for a broad form order in connection with certain alleged unfair labor practices on the part of the employer, set out what has become the guide line to the propriety of issuing such orders. The court stated:

> "We hold only that the National Labor Relations Act does not give the Board an authority, which courts cannot rightly exercise, to enjoin violations of all the provisions of the statute merely because the violation of one has been found. To justify an order restraining other violations it must appear that they bear some resemblance to that which the employer has committed or that danger of their commission in the future is to be anticipated from the course of his conduct in the past. * * *"
>
> *N.L.R.B. v. Express Pub. Co.,* 312 U.S. 426, 437, 85 L. Ed. 930, 937.

A subsequent decision by the Supreme Court in *May Department Stores Co. v. N.L.R.B.* (1945), 326 U.S. 376, 90 L. Ed. 145, rephrased the scope of the Board's

jurisdiction in issuing the Cease And Desist Order in the following terms:

> "The test of the proper scope of a cease and desist order is whether the Board might have reasonably concluded from the evidence that such an order was necessary to prevent the employer before it 'from engaging in any unfair labor practice affecting commerce.' Section 10(a). Equity has long been accustomed in other fields to reach conclusions as to the scope of orders which are necessary to prevent interferences with the rights of those who seek the courts' protection. Injunctions in broad terms are granted even in acts of the widest content, when the court deems them essential to accomplish the purposes of the act. We think that the Board has the same power to determine the needed scope of cease and desist orders under the National Labor Relations Act that courts have, when authorized to issue injunctions, in other litigation."
>
> *May Department Stores Co. v. N.L.R.B.,* 326 U.S. 376, 390-392, 90 L. Ed. 145, 157-158.

In reaching this conclusion the court reaffirmed the above-quoted language in the *Express Pub. Co.* decision.

It would seem quite apparent that where as here a union seeks to coerce an assignment of work by an employer during a jurisdictional dispute both through conduct directed at that union with which the dispute exists and through similar conduct directed at other unions with which the employer deals, the union engaging in such conduct fails within the rationale of the *Express Pub. Co.* and *May Department Stores Co.* de-

cisions thereby justifying a broad form Cease and Desist Order. The action of Respondent in the instant case in connection with its jurisdictional dispute with the Electricians demonstrated a predisposition to violate Section 4(b)(4)(i) and (ii)(D) of the Act and the Order and Notice issued as a result of that activity properly precludes both the direct and indirect methods employed by Respondent to coerce REECO to make certain work assignments.

In *Truck Drivers & Helpers Local Union No. 728 v. N.L.R.B.* (5th Cir. 1964), 332 F. 2d 693, cert. denied, 379 U.S. 913, the court was asked to determine the propriety of an order requiring a union to refrain from certain secondary boycott activities as to "any other person engaged in commerce or in any industry affecting commerce." The court held the order valid stating:

> "Finally, answering the third question, we conclude that the board order is not an unwarranted remedy under the circumstances found by the Board to exist here. In addition to the facts of this case which resulted in a finding by the Board that Local 728 pursued an *overall plan* according to which the employees of eight separate neutral employers were induced to refuse to handle Overnite shipments, the Board had other cases involving this Local which we think warranted its decision that it had 'demonstrated a proclivity to violate the act by secondary boycott activity against persons with whom it develops disputes.' We think the record satisfies the criteria which the Supreme Court has laid down in determining whether a Board Order is of impermissible breadth in N.L.R.B. v. Express

Publishing Company, 312 U.S. 426, 61 S. Ct. 693, 85 L. Ed. 930, and Communications Workers v. N.L.R.B., 362 U.S. 479, 80 S. Ct. 838, 4 L. Ed. 2d 896. See also N.L.R.B v. Local 542 etc., 3 Cir., 329 F 2d 512, 1964" (Emphasis added)

Truck Drivers & Helpers Local Union No. 728 v. N.L.R.B, 332 F. 2d 693, 697.

Accord:

N.L.R.B v. Teamsters, Chauffeurs, Etc., Local 901 (1st Cir. 1963), 314 F. 2d 792, 795.

By its actions in refusing to make deliveries to *all* forward compounds and *all* crafts at the Nevada Test Site, Respondent pursued an *overall plan* in violation of Section 8(b)(4)(i) and (ii) (D) of the Act which justifies the issuance of the Order and Notice in question. The acts of Respondent in the instant case demonstrated an active opposition to the purposes of the Act analogous to those found in *N.L.R.B. v. Bama Co.* (5th Cir. 1965), 353 F. 2d 320, where the court upheld an order requiring the employer to cease and desist from the unfair labor practices found and from "in any other manner infringing upon the statutory rights of its employees", in the following language:

"Respondent suggests the Board order is too broad and general and should be restricted to the facts of this case. The propriety of the Board order depends on the facts in each particular case. In view of the conduct of Respondent, we cannot say that the Board was not warranted in invoking this broad form of order on the basis of an attitude of opposition to the purposes of the Act. [Citations omitted]"

N.L.R.B. v. Bama Co., 353 F. 2d 320, 323-324.

The recent decision of the court of appeals in *Southwire Co. v. N.L.R.B.* (5th Cir. 1967), ... F. 2d ...., 65 L.R.R.M. 3042, provides a workable rationale for examining propriety of the Order and Notice issued in the instant case. There the court stated:

> "We have enforced orders of the kind here involved in cases where the record demonstrates a proclivity on the part of the employer to disregard the Act; otherwise such proposed orders have been limited to like or related conduct. * * *"
>
> "We treat the proposed order which is in the general language of §7 of the Act as being limited to this type of unfair labor practice conduct and as such it will be enforced. We think that Respondent had demonstrated a proclivity to violate these sections of the Act but there is no basis for finding a predisposition to violate other sections of the Act. Violations outside the class with which we are dealing should be left to the normal unfair practice procedures under the Act rather than to the contempt power of the court. [Citation omitted]"
>
> *Southwire Co. v. N.L.R.B.*, ... F. 2d ...., 65 L.R.R.M. 3042, 3044, 3045.

The actions of the Respondent in the instant case in connection with others than the Electricians both demonstrate a proclivity to disregard the Act and constitute "like or related conduct" to that directed at the Electricians. As such, the conduct is within the jurisdiction of the Board to preclude through its Order and Notice under any approach which could be asserted by the Respondent.

Conclusion.

The Intervenor and Charging Party, Reynolds Electrical & Engineering Co., Inc., prays that this Court issue a decree enforcing in whole the Order of the National Labor Relations Board which is the subject of this Petition for Enforcement proceeding, and requiring Respondent, its officers, agents and representatives, to comply therewith.

Dated: September 21, 1967.

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

William F. Spalding